

and freedom of the Countess to employ her own servants, or his freedom and liberty to continue in her service.

It was ANSWERED,—That he, having voluntarily granted this bond, and being conscious to himself that he had formerly made advantage of the Countess's weakness to go about her own affairs, and having the sole trust, did make a great fortune to himself; it was lawful to the charger to take such a bond for his mother's good and the children's.

The Lords did sustain the bond as valid and lawful; and found, That, *eo ipso*, that he voluntarily granted such a bond, he made himself suspect, and did acknowledge his guiltiness; and so decerned him to leave off to serve in that manner he had formerly done.

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1672. *January 3.* The COUNTESS of BRAMFORD and LADY FORRESTER *against* The LAIRDS of CARSE and HOPTOUN.

THE Countess of Bramford, having insisted against Hoptoun, as representing his father, to make payment of the sum of 11,000 merks, as a part of the money due by the Earl of Errol, and his cautioners, to the Earl of Forth, *super hoc medio*, That he had granted a bond of warrandice to the Earl of Errol's cautioners and friends, bearing a receipt of the money from the general commissary, and that new surety was given in his name for the said sum from the Earl of Errol's friends; which accordingly was paid to him; which, by the act of restitution against the forefaulture, declaring intromitters liable, did furnish action against Hoptoun and his heirs to refund the same.

It was ALLEGED for Hoptoun, That it was clear, by the bond and the discharge therein contained, that the receipt of money from the general commissary was granted by Hoptoun's nephew, Sir Thomas Hope of Carss's son, and his mother, who was his tutor; and that the new surety, taken in the name of Hoptoun, was only in trust and for security of his bond of warrandice granted to Errol's cautioners; and, therefore, he neither having intromitted for his own use, nor having taken new bond for his own relief and security,—(but the reason of his giving bond was, because Errol's cautioners could not be satisfied by any bond from a minor or his mother,)—he could not be liable by the act of restitution declaring all intromitters to be liable.

The Lords found, That Hoptoun, having taken a new security in his own name, and that the Earl of Kinnoul's cautioners had paid the same, that he was liable to the pursuer; unless he would allege and instruct, that as he was intrusted for Carse, so the money was truly received by him and his tutor; and that he had such a discharge from them as would bind the intromission upon Carss.

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1672. *January 4.* ROXBURGH *against* BEATTIE.

IN the action before mentioned, betwixt the said parties, Beattie, as having

right by progress from Agnes Sandilands, did insist against James Roxburgh, as representing his father, for employment of the annualrent of 3000 merks, conform to her contract of marriage.

It was ALLEGED for the defender, That he had already employed that sum, in so far as he had purchased a tenement of land, and provided her to the liferent thereof, which exceeds the annualrent of 3000 merks.

It was REPLIED, That her infestment did expressly bear, that it was for implement of another clause of her contract, whereby she was provided to the liferent of the whole conquest during the marriage.

It was DUPLIED, That the infestment was given on death-bed; and there was a reduction depending, wherein they now insisted upon these two reasons:—*1mo.* That the defender was heir, at least was content to serve himself heir, and so had good interest to reduce that infestment, as depending upon the obligation of conquest, in so far as the annualrent of the tenement exceeded the annualrent of 3000 merks, to which she was provided; seeing, if the infestment had not been given, in law she could only crave, in the *first* place, that the provision of her liferent of 3000 merks should be satisfied out of the rent of the tenement, and could only crave the rest of the rent as conquest; whereas, if this infestment, granted on death-bed, be sustained, the liferent of the whole tenement would belong to her as conquest, and the heir should be burdened with the annualrent of 3000 merks. *2do.* The defender, albeit he were not heir, yet, as a lawful creditor to his father, he hath good interest to reduce the said infestment; because no debtor can provide his wife to a conquest in prejudice of a lawful creditor, until first the conquest be ascribed to any provision or liferent made to her by her contract of marriage.

The Lords did sustain the first reason, the pursuer being served heir, for reducing the infestment as granted *in lecto* to his prejudice; and did likewise sustain the second reason at his instance, as creditor, to make them ascribe the lands purchased in satisfaction of her liferent provision, in the *first* place, and for the remainder only to be ascribed to the conquest; because the law provides that just debt be first satisfied.

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1672. January 5. BARBARA HOME against ANDREW BRYSON.

IN a reduction of a right and disposition of a tenement of land, made by the said Andrew's father to him, at the instance of the said Barbara, upon the Act of Parliament 1621, against dyvors and bankrupts, as being in defraud of the liferent provided to her in her contract of marriage; in which there was a conclusion to hear and see it found and declared,—That the price of the said tenement, which he had sold, might be declared liable for making up her liferent provided to her; the said Andrew having deponed upon the price of the said tenement, with this quality,—that, as he had received it, so he had paid the same to a creditor of his father's:—

At the advising of the oath it was ALLEGED, That no respect ought to be had to that quality; because the disposition, being made by a father to his son, which being for no onerous cause, he could not dispose thereof, and apply the